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No. 84-357

In the Supreme Court of the United States

OCTOBER TERM, 1984

SAMUEL D. WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly concluded that petitioner was not entitled to habeas corpus relief or to an evidentiary hearing based on his claim of prosecutorial conflict of interest before the grand jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported, as corrected, at 732 F.2d 1048. The opinion of the district court (which is not reprinted in the appendix to the petition) is reported at 559 F. Supp. 1139.

JURISDICTION

The judgment of the court of appeals (Pet. App. A23) was entered on January 24, 1984. A petition for rehearing was denied on April 3, 1984 (Pet. App. A22). The petition for a writ of certiorari was filed, pursuant to an extension of time, on August 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a former chairman of a New York City Community School Board and a onetime New York City councilman. Following a jury trial in 1978 in the United

States District Court for the Eastern District of New York, he was convicted on one count of soliciting and receiving "under color of official right" a payment of $5000 from Behavioral Research Laboratories, Inc. (BRL), a seller of educational systems and materials, in violation of the Hobbs Act, 18 U.S.C. 1951, and one count of conspiring to defraud the United States of federal funds granted to the school district, in violation of 18 U.S.C. 371. He was sentenced to three months' imprisonment, nine months' probation, and a $5000 fine. Pet. App. A2-A3. His conviction was affirmed by the court of appeals, and this Court denied further review. *United States* v. *Wright*, 588 F.2d 31 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979). The extensive evidence of petitioner's guilt, much of which was documentary, is summarized in the court of appeals' opinion on direct appeal (see 588 F.2d at 32-35).

2. In 1980, after completing his term of imprisonment and on the last day of his probation, petitioner filed the present action under 28 U.S.C. 2255. He challenged his conviction on the ground of prosecutorial conflict of interest before the grand jury. In particular, petitioner alleged impermissible bias at the grand jury stage because Thomas Puccio, the Assistant United States Attorney who presented the case to the grand jury that indicted petitioner, was married to a political opponent of petitioner (C.A. App. 83-84).[1] This issue had been raised and rejected in petitioner's direct appeal (see 588 F.2d at 39).[2] However, based on documents obtained pursuant to informal discovery from the government and Freedom of Information Act requests under federal and state law, petitioner submitted

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[1]Puccio was not the prosecutor at petitioner's trial.

[2]Indeed, the issue of prosecutorial conflict of interest was the sole question presented in the petition for a writ of certiorari that this Court denied on direct review.

certain additional materials in support of his claim. Pet. App. A3-A4.[3]

The district judge who had presided at petitioner's trial rejected the argument that the "prosecution was instituted by the United States Attorney's Office for improper political reasons." 559 F. Supp. 1139, 1152 (E.D.N.Y. 1983). The court found that "[t]he new evidence now cited by petitioner provides no reason * * * to question" the previous conclusion that the indictment was not tainted by prosecutorial conflict of interest (*ibid.*). Because the motion failed to raise material factual issues, the court also denied petitioner's request for further discovery and an evidentiary hearing (*id.* at 1153).

The court of appeals affirmed (Pet. App. A1-A21). It acknowledged that, in light of the further documentation submitted by petitioner, "the issue was not so simple as this court believed in 1978" (*id.* at A9). The court fully considered petitioner's new evidence and understood it to show that Puccio's wife had been involved in additional instances of activities against petitioner, that an Assistant United States Attorney other than Puccio had previously conducted a grand jury investigation of petitioner and was of the view that federal (as distinguished from state) charges should not be brought, and that an investigation by the Department of Justice's Counsel on Professional Responsibility into petitioner's allegations against the United States Attorney's office had been perfunctory and the letter

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[3]Petitioner also sought a new trial under Fed. R. Crim. P. 33 on the grounds that the government's failure to disclose various materials in connection with the original trial violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), and that some members of the jury might have been prejudiced against him for racial reasons. The district court rejected these contentions (559 F. Supp. 1139, 1143-1152 (E.D.N.Y. 1983)), and the court of appeals affirmed (Pet. App. A4 & n.2). Petitioner has not renewed these claims before this Court.

signed by the Attorney General exonerating the office had been adopted from a draft prepared by the United States Attorney in question (*id.* at A9-A13).[4] Based on these factors, the court concluded that it was "hard to deny that the decision" to assign Puccio to handle the grand jury proceeding "created an appearance of impropriety" (*id.* at A14 (footnote omitted)) and that "[i]t would have been far better" to bring in another Assistant United States Attorney (*id.* at A15).

However, "interpret[ing] the facts most adversely to [the] prosecutors" and "with the facts taken at their worst against the Government" (Pet. App. A20), the court of appeals held that petitioner was not entitled to reversal of his convictions under 28 U.S.C. 2255. The court concluded that, even if it assumed arguendo that it would have dismissed the indictment in the exercise of its supervisory power if the present record had been before it on direct appeal (Pet. App. A17),[5] petitioner had not alleged either a constitutional error or a nonconstitutional error resulting in a miscarriage of justice that would warrant collateral relief (*id.* at A18-A21).

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[4]We do not necessarily agree with the court's characteri zation of the record in this case. The government's position is set forth in its submissions to the court of appeals to correct the opinion. (Copies of these papers are being provided to counsel for petitioner and lodged with the Clerk of this Court.) Although the court of appeals modified its opinion in certain respects in response to those submissions, in our view the opinion still is not entirely accurate in reflecting the undisputed documentary record. Nevertheless, because petitioner is not entitled to relief even on the facts as viewed favorabiy to him by the court of appeals, we shall for present purposes accept without further discussion the court of appeals' understanding of the evidence.

[5]The court stated that the issue whether petitioner's conviction would have been reversed on direct appeal in light of the present record "is a question of some difficulty, but one that we need not decide" (Pet. App. A15). It did observe, however, that petitioner's claim did not satisfy the legal standard for establishing improper selective or discriminatory prosecution and did not "approach[]" the kind of flagrant prosecutorial misconduct before the grand jury that had been found sufficient in other cases to justify dismissal of an indictment on direct appeal (*ibid.*).

The court of appeals recognized that a prosecutor "is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant" (Pet. App. A16). It also indicated that " 'the practical impossibility of establishing that the conflict has worked to defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice' " (*ibid.* (citation omitted)). The court ruled, however, that petitioner's allegations were insufficient to set aside his convictions. It noted that "there is no basis for a claim that [Puccio] did not believe [petitioner] to be guilty" and that petitioner's contention instead was that Puccio "had an additional and impermissible reason in forwarding the prosecution" (*id.* at A15-A16 n.7). This contention was unavailing because "the decision to pursue the investigation was made by [United States Attorney] Trager, not by Puccio, and the indictment was signed by him" (*id.* at A19), and because in any event the alleged interest of Mrs. Puccio "was not a pecuniary interest * * * but a public one in the condemnation of a man whom she thought, whether for good reasons or for bad, to have violated the public trust" (*id.* at A20). As the court of appeals summarized (*id.* at A18, A21 (footnote omitted)):

> [Petitioner] was found guilty beyond a reasonable doubt on ample evidence after a fair trial before an unbiased jury. There is no reason to question that the grand jury had sufficient evidence to support the lesser requirement of probable cause to believe that [petitioner] had committed the crimes charged. [Petitioner's] claim is rather that if * * * [Puccio had not been assigned to the grand jury investigation, petitioner] would not or might not have been indicted for a crime which, as the jury's verdict demonstrates, he had in fact committed.
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> * * * * *

> At the very most, and the allegations scarcely go this far, [the choice of Puccio to handle the case at the grand jury stage] deprived [petitioner] of the chance that, with another prosecutor, he might have undeservedly escaped indictment and consequent conviction for crimes of which he was properly found to be guilty.

ARGUMENT

1. Petitioner does not dispute that he was found guilty by an impartial and properly instructed jury on the basis of proof beyond a reasonable doubt adduced at a fair trial. Rather, he seeks to have his convictions set aside under 28 U.S.C. 2255 on the ground of a prosecutorial conflict of interest before the grand jury that indicted him. The court of appeals correctly rejected petitioner's contention, and further review is not called for.

First, as petitioner himself acknowledges (Pet. 18, 32), "[t]he facts of this case are unique in * * * respects not likely to be repeated" and the alleged "prosecutorial conflict of interest in this case is one that has seldom if ever surfaced in reported cases." Given the novel character of the question presented, review by this Court is not indicated.

Moreover, the outcome in this case depends substantially upon an assessment of the nature and extent of Mrs. Puccio's activities against petitioner and the effect if any of her actions on the official conduct of the United States Attorney's office. Indeed, petitioner argues at length (see Pet. 20-26) that, while "the Court of Appeals spelled out with precision * * * [the relevant] facts, it did not perceive the[ir] full [importance]" (*id.* at 20). These largely fact-bound issues do not warrant this Court's attention, particularly since they were resolved against petitioner on the basis of an "interpret[ation of] the facts most adverse[] to [petitioner's] prosecutors" and "with the facts taken at their worst against the Government" (Pet. App. A20).

2. a. In any event, petitioner's argument is without merit. He first contends (Pet. 15-26) that his convictions should have been set aside under 28 U.S.C. 2255 if they would have been reversed on direct appeal.[6] However, in rejecting this contention the court of appeals followed established standards governing collateral relief. "It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *United States* v. *Addonizio*, 442 U.S. 178, 184-185 (1979) (footnote omitted). Thus, "a collateral challenge may not do service for an appeal. * * * * * [T]o obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *United States* v. *Frady*, 456 U.S. 152, 165, 166 (1982) (footnote omitted).

Petitioner does not take issue with this general principle (see Pet. 16), but he argues that it is inapplicable here because the inadequacies in the record on direct appeal were "attributable solely" (*id.* at 19) to the government's failure to bring to the court's attention the additional evidence that

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[6]The court of appeals has held that prosecutorial impropriety before the grand jury can be a basis for reversing a conviction on direct appeal. See *United States* v. *Hogan*, 712 F.2d 757 (2d Cir. 1983). However, contrary to petitioner's suggestions, the court below did not determine that it would have reversed petitioner's convictions on direct appeal if the present record had then been before it. Rather, as discussed above (see page 4 & note 5, *supra*), the court simply assumed without deciding that such reversal would have been appropriate, and in fact the court's opinion indicates considerable doubt whether the present record would justify overturning petitioner's convictions on direct appeal; as the court noted, "[a]ppellate dismissal of an indictment for prosecutorial misconduct, after a conviction following a fair trial to an unbiased jury, is strong medicine" (Pet. App. A15). Given that (as discussed below) petitioner has not shown a violation of any fundamental right, that the alleged conflict of interest did not involve flagrant or recurring conduct (see *ibid.*), and that there is no challenge to the grand jury's determination of probable cause (*id.* at A18 & n.9) or the petit jury's verdicts of guilty (*id.* at A18, A21), reversal of petitioner's convictions on direct appeal would not have been warranted.

petitioner has now developed. However, petitioner has made no showing that he could not have discovered the same information at the time of his trial; indeed, the government voluntarily agreed to provide information through informal discovery in the collateral proceeding, and in fact it appears that petitioner did not request materials pursuant to the Freedom of Information Act until well after his direct appeal had been concluded and he had completed his incarceration (see C.A. App. 806-807). As in cases involving claims of newly discovered evidence under Fed. R. Crim. P. 33,[7] a defendant pursuing post-conviction remedies cannot take advantage of his lack of diligence at trial.

b. Petitioner also argues (Pet. 27-36) that the court of appeals should have exercised its supervisory power to set aside his convictions on collateral attack.[8] However, a court's supervisory power cannot be used to circumvent established limitations on the legal rights or remedies that a defendant is invoking. See *Hobby* v. *United States*, No. 82-2140 (July 2, 1984), slip op. 10; *United States* v. *Hasting*, 461 U.S. 499, 505-507 (1983); *United States* v. *Payner*, 447 U.S. 727, 734-737 (1980); *Costello* v. *United States*, 350 U.S. 359, 363-364 (1956). For this reason, petitioner cannot rely on a court's supervisory power to avoid the requirements for collateral relief.

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[7]See 8A *Moore's Federal Practice* para. 33.03[1], at 33-18 (2d ed. 1983); 3 C. Wright, *Federal Practice and Procedure: Criminal* § 557, at 315, 327-329 (2d ed. 1982).

[8]Contrary to petitioner's statement (Pet. 29), the court of appeals did not hold that it "lacked authority" to exercise supervisory power. Indeed, the court's discussion of nonconstitutional and nonjurisdictional defects as a basis for granting collateral relief (Pet. App. A18), and its recognition that claims of prosecutorial misconduct are cognizable on collateral attack (*id.* at A17 n.8), suggest the opposite conclusion.

c. Accordingly, the real issue in this case is whether petitioner's claim of prosecutorial conflict of interest meets the standard for collateral relief (see Pet. 36-49). The court of appeals correctly concluded that it does not.

With respect to petitioner's constitutional argument, the court pointed out that "the decision to pursue the investigation was made by Trager, not by Puccio, and the indictment was signed by him. * * * [We cannot] draw an inference that Puccio was the real instigator of the decision to proceed * * * [especially since petitioner] does not even allege this and all the evidence is to the contrary" (Pet. App. A19-A20 (footnote omitted)). Moreover, in terms of the impropriety asserted by petitioner, the court observed that neither Mrs. Puccio nor the prosecutors were alleged to be "utilizing the criminal process to advance their own pecuniary interests" and that, at worst, Mrs. Puccio's interest was "a public one in the condemnation of a man whom she thought, whether for good reasons or for bad, to have violated the public trust" (*id.* at A20). Therefore, while the choice of Puccio as prosecutor before the grand jury may have been "ill advised," it did not violate due process as an effort to use the criminal law "for purpose of private gain" (*ibid.*).[9]

With respect to petitioner's assertion of a nonconstitutional error resulting in a miscarriage of justice, the court of appeals rightly observed that the claim of prosecutorial conflict of interest "do[es] not begin to measure up to [the required] standard" (Pet. App. A18). Emphasizing that

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[9]In light of Puccio's role in the prosecution and the nature of the alleged conflict of interest, the court of appeals correctly concluded (Pet. App. A19-A20) that, contrary to petitioner's argument (Pet. 42), the decision below does not conflict with *Ganger* v. *Peyton*, 379 F.2d 709 (4th Cir. 1967). *Ganger* involved an attempt by a part-time prosecutor to use criminal charges against a defendant to obtain a greater property settlement (and a potentially larger attorney's fee) in a pending divorce action in which the prosecutor represented the defendant's wife.

there was no reason to doubt the evidence before the grand jury of probable cause to indict and that the proof at trial established petitioner's guilt beyond a reasonable doubt, the court recognized that petitioner's argument is nothing more than a claim that, if Puccio had not been assigned to the investigation, petitioner "would not or might not have been indicted for a crime which, as the jury's verdict demonstrates, he had in fact committed" (*ibid.*). This argument falls far short of establishing a fundamental defect or manifest injustice.[10]

d. Finally, petitioner maintains (Pet. 50-57) that he was entitled to full discovery and an evidentiary hearing on his Section 2255 motion. He proposes, more than seven years after the indictment was returned, to undertake a broad exploration of a wide range of issues, including (i) "what * * * Puccio did before the grand jury — how he introduced the matter, how he charged the grand jury, the witnesses he called, the questions he asked * * *, the attitudes he may have conveyed by words or deeds and how he may have otherwise exercised his discretion and performed his duties toward the grand jury" (Pet. 52-53); (ii) "the assertions of Mr. Trager * * * [in his affidavits, his] involvement in the investigation and indictment of * * * [petitioner, his]

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[10]Petitioner complains (Pet. 46-49) about the appearance of Allen Calvin as a witness before the grand jury and the leading questions that were asked on the issue whether petitioner induced the payment from BRL. Of course, it is not a valid objection that the grand jury proceeding may not have conformed to the strict evidentiary and procedural rules applicable at trial. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 349-350 (1958); *Costello* v. *United States*, 350 U.S. 359 (1956). Nor does this show, as petitioner asserts (Pet. 49), any bias on Puccio's part; indeed, as petitioner elsewhere recognizes (*id.* at 54), the questioning of Calvin before the grand jury was conducted by another Assistant United States Attorney, not by Puccio. Finally, to the extent that the question of inducement is relevant to petitioner's convictions, the petit jury necessarily found against petitioner in that regard, and the sufficiency of the evidence was upheld on direct appeal (588 F.2d at 33-35).

knowledge of the case * * * [and whether he] was influenced in some subtle ways by his assistants" (*id.* at 55-56); and (iii) "Mrs. Puccio's motives and interests * * * [as well as t]he full extent of the activities Mrs. Puccio may have carried out against [petitioner] both before and after her marriage * * * and other manifestations of her animus against him" (*id.* at 56-57).

The courts below properly declined to permit petitioner to pursue such an inquiry. Evidentiary discovery and a hearing are required only if the claim cannot be conclusively determined from the motion and the files and records of the case. See 28 U.S.C. 2255. In this case, even "with the facts taken at their worst against the Government" (Pet. App. A20), petitioner failed to present any issue that could not be properly resolved on the existing record.[11] Especially in view of the extensive materials provided to petitioner pursuant to informal discovery and his Freedom of Information Act requests, it was not error to conclude that additional discovery and a hearing were unnecessary, and further review of this question is not warranted.

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[11] In other words, it was the nature of the alleged impropriety, not the evidence in support of the allegation, that the court of appeals held to be insufficient to justify collateral relief. Indeed, by assuming arguendo that it might have reversed on direct appeal in light of the present evidence, the court made clear that its decision did not turn upon the lack of an adequate record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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